Filed 1/9/19 P. v. Ambriz CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOEL IGNACIO AMBRIZ et al., Defendants and Appellants.	B279785 (Los Angeles County Super. Ct. No. TA132075) ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed on December 14, 2018 be modified as follows:

On page 11, line 7, insert the word "audio," between the words "resulting" and "recordings" so the sentence reads as follows:

> The resulting audio recordings were played for the jury at trial.

There is no change in the judgment. Appellant Ambriz's petition for rehearing is denied.

JOHNSON, Acting P. J. BENDIX, J. CURREY, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 12/14/18 P. v. Ambriz CA2/1 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOEL IGNACIO AMBRIZ et al., Defendants and Appellants.	B279785 (Los Angeles County Super. Ct. No. TA132075)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed in part, reversed in part, and remanded with instructions.

Jin H. Kim, under appointment by the Court of Appeal, for Defendant and Appellant Joel Ignacio Ambriz.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Albert Sandoval.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joel Ignacio Ambriz (Ambriz) and Albert Sandoval (Sandoval) of the murders of Jose Rodriguez and Cesar Perea, as well as the attempted premeditated murders of Jhony Rodas and Ricardo Garcia. The jury also found that the alleged firearm and gang allegations were true. We affirm in part and reverse in part. We remand so that the trial court can: (1) strike the Penal Code section 12022.53, subdivision (d), enhancement imposed on Ambriz in count 4; (2) strike the 10-year gang enhancements imposed on Ambriz and instead impose a 15-year minimum parole eligibility terms on counts 1 through 3; (3) strike the 10-year gang enhancements imposed on Sandoval and instead impose a 15-year minimum parole eligibility term on count 4 only; (4) hold a new sentencing hearing for Ambriz and Sandoval to consider whether to strike the firearm enhancements in counts 1 through 4 pursuant to the discretion conferred by Senate Bill No. 620; and (5) correct Ambriz's abstract of judgment to reflect joint and several liability for the restitution order.

BACKGROUND

I. Charges

The Los Angeles County District Attorney charged Ambriz and Sandoval with two counts of special circumstance multiple

murder (Pen. Code,[1] §§ 187, subd. (a), 190.2, subd. (a)(3); counts 1, 4), and two counts of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664; counts 2, 3.) As to count 1 (the murder of Rodriguez), the district attorney alleged that Ambriz personally used and discharged a firearm (§ 12022.53, subds. (b), (c), (d).) As to count 2 (the attempted murder of Rodas) and count 3 (the attempted murder of Garcia), the district attorney alleged that a principal personally used and discharged a firearm (§ 12022.53, subds. (b), (c), (e)(1).) As to count 4 (the murder of Perea), the district attorney alleged that a principal personally used and discharged a firearm (§ 12022.53, subds. (d), (e)(1).) The district attorney further alleged that Ambriz and Sandoval committed the offenses for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(C), (b)(5).) The district attorney also alleged that Ambriz had one prior serious felony conviction as well as one prior strike conviction (§§ 667, subds. (a), (b)-(i), 1170.12, subds. (a)-(d).)

II. Prosecution Evidence

A. *The Murder of Cesar Perea*

Perea worked at Chiki's Barbershop in Los Angeles. Perea lived in a home behind Ernesto Ocon's house. Ambriz and Sandoval regularly hung out at Perea's house. Ocon described Ambriz as a tall man with baggy clothes and short hair and identified Ambriz from a photograph. According to Ocon, Ambriz visited Perea a few times. Ambriz arrived in a green car and once pulled off a gate as he entered. Perea often expressed

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[1] All subsequent statutory references are to the Penal Code, unless otherwise indicated.

concerns about Ambriz to his brother, Alex Perea (Alex), and told Alex not to hang around with Ambriz.

On the evening of March 21, 2013, Perea was working at the barbershop. Perea's friends, Cesar Ortiz, Adrian Gutierrez, and Bryan Arreaga, were socializing at the barbershop. At about 10:00 p.m., Ambriz and Sandoval entered the barbershop. Ambriz was taller than Sandoval.[2] Both men wore baggy shorts and hooded sweatshirts that covered their faces. According to Ortiz, Ambriz and Sandoval said, "What's up?" as they entered the barbershop. Sandoval asked Arreaga if he had any "tacas," or tattoos. Arreaga thought Sandoval was asking if he was in a gang, and Arreaga said no. Arreaga was scared and avoided eye contact with Sandoval. Gutierrez thought that Ambriz and Sandoval were "mean mugging" and "mad-dogging" everyone and looked at everyone "crazy for no reason." Ambriz told Arreaga to close the door. Arreaga thought that Ambriz and Sandoval were acting aggressively and that Perea responded to their actions with "weird body language." Perea said he had to wash up and rushed to the back of the barbershop, followed by Ambriz and Sandoval. Several minutes later, they returned to the front of the shop.

Ambriz and Sandoval left the barbershop. Ortiz and Gutierrez left the shop about five minutes later, at around 11:00 p.m. Perea and Arreaga remained in the shop. At some point, Arreaga believed that something was wrong based on what had transpired. He left the barbershop and walked toward his truck.

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[2] Ambriz was six feet two inches tall and, in February 2014, weighed 180 pounds. Sandoval was five feet nine inches tall and, in April 2014, weighed 176 pounds.

Before Arreaga reached his truck, however, he heard a loud gunshot coming from the barbershop. Arreaga got into his truck and looked back at the barbershop. He saw the shadow of a short man looking from side to side out of the barbershop's front door. Arreaga, frightened, parked by the beach that night in order to sleep.

At about midnight on March 21, 2013, Alicia Garcia heard a gunshot near the barbershop. The next morning at about 6:00 a.m., she looked through the security door to the back of the barbershop and saw Perea lying on the floor with blood around him. Perea was unresponsive and Alicia Garcia's daughter called for an ambulance. Officer Mark Rakitis responded to the barbershop. The front door was locked, so paramedics forced entry. Perea was lying dead on the floor, partially in the hallway and partially in the bathroom. Perea held toothpaste and a toothbrush in his left hand and had a cut above his right eyebrow. The right corner of the sink was cracked and there was blood splatter on the corner.

Perea died from a gunshot wound to the head. The bullet had entered the back of his head and lodged in his brain. There was stippling around the entrance wound on the back of his head, indicating that the gun was fired at close range. Perea also had a gunshot wound to his left lower leg. A bullet was recovered from Perea's brain, and a bullet fragment was recovered in the lower left leg area. Criminalist Allison Manfreda examined the recovered bullet and fragments and determined that they were fired from the same gun and that the bullet was most likely fired from a revolver.

About five days after Perea's murder, Ambriz asked Luis Huerta if he knew anyone who wanted to buy a gun. Huerta said

he did not and Ambriz left. Huerta relayed this exchange to Alex. Police officers then interviewed Huerta about Ambriz's statement. On April 22, 2014, Ambriz's girlfriend, Charlene Verdugo, went to Huerta's house and began screaming at him, calling him a snitch. She said, "You're out of the fucking picture." Huerta took that to mean that he was going to be killed.[3] Huerta reported the threat to police. On April 23, 2014, Huerta identified Verdugo in a photo lineup. Huerta said he had been afraid during the incident and, at trial, said he continued to be afraid.

B. *Witness Identifications*

The morning after the shooting, Ortiz and Gutierrez learned that Perea had been killed. On April 6, 2013, detectives spoke to Gutierrez about the murder. At that time, Gutierrez was too afraid to tell detectives that he knew who had been in the barbershop on the night of the murder. However, on February 18, 2014, Gutierrez told detectives that he knew the identities of the two men present in the barbershop that night. In a six-photo array, Gutierrez identified Ambriz and Sandoval as the men in the barbershop that night. Perea had told Gutierrez that Ambriz and Sandoval were coming around his house too often and Perea did not want them there. At trial, Gutierrez again identified

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[3] While it is unknown if Ambriz was trying to sell the murder weapon or another gun, we "must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Furthermore, it is unlikely that Ambriz's girlfriend would have had such an outsized reaction had Huerta revealed to police that Ambriz tried to sell a gun unconnected to any crime.

Ambriz and Sandoval as the two men who had entered the barbershop on the night of the murder. He recognized them as men who used to hang out at Perea's house.

Arreaga went to the police on April 30, 2013. Before that, he had been afraid of being labeled a "snitch." Arreaga gave the police a description of the tall man in the barbershop on the night of the murder and said that he had seen him before. Arreaga knew Ambriz before the shooting. They had attended school together and Ambriz would sometimes come into the barbershop. In November 2013, detectives showed Arreaga a photo lineup. Arreaga was extremely nervous and initially chose three photos as having similar characteristics of the tall man in the barbershop. He then selected a photo of Ambriz as the tall man. At trial, Arreaga again identified Ambriz as the tall man who had entered the barbershop on the night of the murder. Arreaga said he was certain about his identification of Ambriz. However, Arreaga was unable to identify the shorter man who had been in the barbershop that night with Ambriz.

C. *The Murder of Jose Rodriguez*

On February 9, 2014, around 3:00 p.m., Rodriguez, Garcia, Rodas, and Jose Tlaseca, along with some other individuals, were gathered in an alley behind an apartment building on Avalon Boulevard in Los Angeles. Some of the men were playing cards. Garcia, Rodas, and Tlaseca knew Rodriguez as "Cepillin." Ambriz arrived, parked his car, and exited from the driver's seat. There was at least one other person in the car. Ambriz approached the men playing cards. Ambriz was either by himself

or was accompanied by Sandoval.[4] Ambriz said, "The terrain is hot." The men did not know what Ambriz meant by this. Ambriz returned to his car in the driver's seat and, with Sandoval in the front passenger seat, drove away. The men continued playing cards.

At around 5:00 p.m., while it was still light outside, Ambriz returned, parked in the same spot as before, and got out from the driver's side of the car. Sandoval was in the front passenger seat. Ambriz approached the group and yelled, "Ciudado, cabron," which loosely translated to English as "Careful, son of a bitch." He fired several shots at the men. Ambriz fired two or three shots from near the passenger side of the car, then moved and fired three or four shots from the rear of the car. He moved closer to the men and fired four more shots. When Ambriz first fired, Rodas heard Sandoval yell from inside the car something like, "You're not gonna hit anybody" from that location and to "get closer" or "give it to them."[5] Ambriz then moved closer to the other men and continued to shoot at them. According to Rodas, after Sandoval shouted those words from inside the car, Ambriz got more daring in approaching the other men.

Garcia, Rodas, and Tlaseca were able to get to the ground or under some nearby cars. However, Rodriguez was unable to move out of the path of the bullets. Rodas heard sounds of the gun "clicking" like it was out of bullets. Ambriz ran back to his

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[4] According to most of the men in the alley, Sandoval remained in the car during this encounter. However, Garcia said that Sandoval approached the group with Ambriz at this time.

[5] Although Rodas said someone from inside the car yelled these words, he later clarified that Sandoval was the only other person inside the vehicle.

car, got into the driver's seat, backed out of the alley, and drove away. Rodriguez had been shot and screamed that he could not feel his legs. Police officers responded to the shooting and found Rodriguez shot in the leg. Officers recovered several .45-caliber shell casings and bullet fragments. Detective Cesar Espinoza spoke with witnesses, who described Ambriz as possibly involved in the shooting. The detective obtained a photo of Ambriz and showed it to Rodas and Garcia, who both identified Ambriz as being involved in the shooting.

Rodriguez died in a hospital on August 9, 2014, several months after this shooting. He had sustained multiple gunshot wounds that caused injury to his kidney and spine, which rendered him paraplegic. Rodriguez ultimately died from pneumonia resulting from complications caused by his gunshot wounds.

D. *Witness Identifications*

On the night of the shooting, Garcia identified a photo of Ambriz and described the other man seated in Ambriz's car. On February 11, 2014, Garcia identified a photo that was not Ambriz as looking like the shooter. On February 24, 2014, Garcia identified Sandoval as the man who had been in the car with Ambriz. At the preliminary hearing, Garcia identified Ambriz and Sandoval as the men who had participated in the shooting. At trial, Garcia identified Ambriz and Sandoval as the two men he had seen that day, and identified Ambriz as the shooter. Garcia was certain in his identification of Ambriz. Garcia said he had seen Ambriz "a lot of times" before in the neighborhood, and had seen Sandoval "a couple of times." At trial, Tlaseca also identified Ambriz as the shooter. Tlaseca had seen Ambriz in the

neighborhood before the shooting and had no trouble recognizing his face. Rodas also identified Ambriz as the shooter and identified Sandoval as the man in Ambriz's car.[6] Rodas said he had seen Ambriz several times before the shooting and knew he lived in the area. Ambriz lived in the apartment building next to the alley. About a year before the alley shooting, Ambriz had hit Rodas with a bottle. Rodas was afraid of Ambriz after that. Rodas had also been involved in an argument with Sandoval before the alley shooting.

E. *Arrest and Jail Recordings*

On February 12, 2015, Border Patrol Agent Ronald LeBlanc encountered Ambriz outside an abandoned building off Interstate 10 in New Mexico. Agent LeBlanc detained him pursuant to an outstanding arrest warrant. In the car was a loaded semiautomatic Glock handgun, a suitcase containing clothes, and a duffel bag. Seven shell casings recovered from the alley shooting site had all been fired from the same gun found in Ambriz's car. Sandoval was arrested in San Bernardino on April 7, 2014. His seized cell phone contained several photos, taken between February and April 2014, showing him making gang

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[6] Rodas used an interpreter at trial. Shortly before identifying Sandoval as the other man in Ambriz's car, Rodas testified that there were more than two people in the car. In a confusing follow up question, Rodas was asked: "Is that counting [Ambriz] and one more?" and Rodas answered: "Yes." Rodas was then allowed to refresh his recollection with a police report and confirmed that Sandoval was in Ambriz's car when it arrived the second time. Later during trial, Rodas unambiguously testified that Sandoval was the only other person in Ambriz's car.

signs. On March 12, 2014, Deputy John Drake searched Ambriz's cell at the jail where he was housed. The deputy found a "roll call" writing that listed the monikers of gang members who were in custody at the time.

On April 8, 2014, Sandoval was placed in a cell equipped with visual and audio monitoring with an informant posing as a gang member. The resulting recordings were played for the jury at trial. In the recordings, Sandoval identified himself as "Green Eyes from South Side Players." Sandoval complained that he was being charged with murder and "the homie from the hood got three attempts."[7] Sandoval said: "[M]y homie's that's locked up right now, we're going to see each other. He's my crimey." ("Crimey" meant crime partner.) Sandoval said his older homie was called "Bird" because he was tall. Sandoval said: "The homie got rid of the burner, fool . . . . We got rid of that shit." "But then the homie got hit with another . . . .45. They found it." "They found the .45 on my homie."[8] Sandoval told the informant,

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[7] Because Rodriguez did not die until August 9, 2014, his shooting would still be considered an attempted murder rather than a murder at the time of this conversation.

[8] Sandoval's description of his homie made it clear he was referring to Ambriz. Sandoval said he was being charged with murder and that his "homie from the hood got three attempts" when Rodriguez's shooting was still considered an attempted murder. Sandoval also said that he and his homie, who was also in custody, would be seeing each other soon and described him as his partner in crime. Unless they were codefendants, it seems unlikely that Sandoval could have known for certain that he would be seeing his homie soon. Sandoval also said his homie was called "Bird" because he was tall. Ambriz was six feet two inches tall while Sandoval was only five feet nine inches tall.

"The first murder, they're saying that I was involved at that barbershop, whoop, whoop, whoop." Sandoval said: "I just seen that nigga laid out with the toilet full of blood. But yeah. I hit that nigga on the head. Pop, pop, pop." The video showed Sandoval in a shooting stance and firing a gun with his right hand. Sandoval said the police did not have the gun, that he wiped off the bullets, and that he brought gloves. After the shooting, Sandoval said he "locked the door and closed it and we left." When the informant asked whether he and Ambriz had wiped the door, Sandoval said, "Yeah." The informant asked Sandoval if the shooting was about money or whether it was personal. Sandoval simply responded: "Just a weird ass fool. Fuck that fool."

When asked by the informant whether anyone was hit in the alley shooting, Sandoval said: "Like, two of them. One of them—well, he hit him with a .45.[9] That nigga told me he ripped the half . . . [a]nd they split, nigga. I just seen the nigga leave. That fool was screaming . . . he went for the main one. Pop. Missed that nigga." When the informant asked who was "the fool [that] got popped," Sandoval said, "some paisa." ("Paisa" meant a native Spanish speaker.) The informant said, "You know once you pull it once, you got to keep busting." Sandoval responded: "He did, fool. He let off like, five shots. Five shots." Sandoval continued: "And then I remember one time, he let go of the strap. We were drunk, fool. Like, let me shoot, fool. Fine. 'Cause . . . they were trying to be in the hood riding around, fool. So got that shit. What's up, fool? . . . little homie. There was

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9 As noted above, officers recovered several .45-caliber shell casings and bullet fragments at the alley shooting.

some little fool right there from South Los. What's up, fool? Where you all from? Fuck . . . homie. My—South Side Players. I don't bang. All right. Fuck South Los, homie. Yeah." Sandoval also referred to two "slobs," which is a derogatory reference to Blood gang members.

On April 8, 2014, Sandoval was recorded from jail in a phone conversation with his mother. Sandoval said that he believed the informant he was talking to in his cell was from the Harpy's gang. On February 26, 2014, in a recorded phone conversation with his girlfriend, Ambriz said he was charged with both murder and attempted murder but that he did not shoot anyone. Prosecutors filed the Rodriguez murder case on February 12, 2014, and filed the Perea murder case on April 9, 2014.

F. *Gang Evidence and Expert Testimony*

Detective Christian Perez served as the prosecution's gang expert and testified about general gang culture. He explained that gang members commonly had multiple monikers. They earned respect and rose within the gang by committing crimes, particularly going into rival gang territory and shooting rivals. Witnesses who talked to law enforcement often were intimidated or assaulted by gang members. The Mexican Mafia, which controlled several gangs in Southern California, mandated that gang members were not to commit drive-by shootings. As a result, gang members had to approach victims on foot and shoot. The Southside Players gang claimed territory in South Central Los Angeles County and had over 100 members. Members used common gang signs and used "SSP" and "Jugadores" to signify

their gang.[10] Their primary activities included assault, drug sales, and robberies.

Police officers had several encounters with Ambriz and Sandoval during which they admitted being gang members. On December 30, 2009, an officer contacted Sandoval and filled out a field identification card (F.I. card). Sandoval admitted to being a Southside Players gang member with the moniker of Lil Slick. He had an "L.A." tattoo on his stomach. On December 30, 2010, an officer contacted Sandoval and filled out an F.I. card. Sandoval admitted membership in Southside Players with a moniker of Casper. He had a skull tattoo on his right forearm. On March 10, 2011, an officer contacted Sandoval and completed an F.I. card. Sandoval admitted that he was a Players gang member with a moniker of Lil Boxer. He had a "Players" gang tattoo on his left arm. On February 26, 2012, an officer contacted Ambriz and completed an F.I. card. Ambriz admitted membership in "Southside Watts, KMT," with a moniker of Nacho. He had tattoos on his chest and back. The F.I. card documented Ambriz's height as six feet two, and his weight as 203 pounds. On February 13, 2013, an officer contacted Ambriz and Sandoval and completed an F.I. card. Sandoval admitted to being a member of the Sub Boys clique of the Southside Players gang with a moniker of Lil Slick. Sandoval had a "Players" gang tattoo on his left arm. The officer was unsure if a separate F.I. card was created for Ambriz. On June 10, 2013, an officer encountered Sandoval and completed an F.I. card. Sandoval said he was a Southside Players gang member with a moniker of Casper. He had "SSP" tattooed on his right bicep.

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[10] "Jugadores" means "players" in Spanish.

Sandoval had several gang tattoos, including three dots around his left eye, which means "my crazy life" in gang culture; "SSP," meaning Southside Players, on his bicep; "LA" and "P," for Players, on his stomach; "SC," for South Central, on his calf; three dots on his right hand; "Players" on his left arm; and "Los Jugadores," meaning the Players, on the back of his neck. Ambriz also had several tattoos, including "LA" on his leg, and several female names. Photos stored in Sandoval's cell phone showed him making gang signs.

Detective Perez opined that Ambriz was a Southside Players gang member based on his jail cell vandalism, his operating by Mexican Mafia rules while in custody, and his partner, Sandoval, referring to him as "Bird" and his "crimey." Detective Perez opined that Sandoval was a Southside Players gang member based on his numerous gang tattoos and his statements made while in custody, including introducing himself to his cellmate as "Green Eyes" from Players. Given two hypothetical fact patterns based on the facts of this case, Detective Perez opined that both the barbershop and alley shootings were committed for the benefit of, and in association with, a criminal street gang.[11]

III. Verdict and Sentencing

Following trial, the jury found Ambriz and Sandoval guilty of first degree murder on count 1 (Rodriguez) and count 4 (Perea), and guilty of attempted premeditated murder on count 2 (Rodas)

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[11] Defense investigator Gregorio Estevane testified that the shootings might not have been committed for the benefit of a criminal street gang because there was no gang announcement or evidence of retaliation.

and count 3 (Garcia). The jury also found that the firearm and gang allegations were true.[12] The trial court sentenced Ambriz and Sandoval each to two consecutive terms of life in prison without the possibility of parole (LWOP), plus 64 years to life, plus 40 years in state prison. On counts 1 and 4, the court imposed consecutive terms of LWOP, plus 25 years to life for the firearm enhancement (§ 12022.53, subds. (d), (e)(1).) On counts 2 and 3, the court imposed consecutive terms of life in prison (with a minimum term of seven years), plus 20 years for the firearm enhancement (§ 12022.53, subd. (c).) The trial court imposed and stayed 10-year terms for the gang enhancement for each count.

On appeal, Ambriz contends that: (1) his conviction for Perea's murder should be reversed because there was no substantial evidence that Ambriz knew of Sandoval's intent to kill Perea or that Ambriz specifically intended to assist Sandoval in committing the offense; (2) the true finding that Ambriz personally discharged a firearm in connection with Perea's murder should be reversed because it is not supported by substantial evidence; (3) his conviction for Rodriguez's murder should be reversed because there was no substantial evidence that Ambriz's actions were a substantial factor in causing Rodriguez's death; (4) the four 10-year gang enhancement sentences should be struck because murder and attempted murder are not subject to the enhancement; (5) the case should be remanded to permit the trial court to exercise its discretion to strike the firearm enhancements under section 12022.53, subdivision (h); and (6) the abstracts of judgment should be

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[12] Ambriz's prior convictions were neither admitted nor proved.

amended to reflect the trial court's oral order that Ambriz's liability for victim restitution is joint and several with Sandoval. The prosecution has conceded Ambriz's second, fourth, fifth, and sixth claims.

On appeal, Sandoval contends that: (1) his conviction for Rodriguez's murder should be reversed because there was no substantial evidence that he aided and abetted the offense; and (2) the trial court erred in excluding his exculpatory jail phone conversation. Like Ambriz, Sandoval contends that the case should be remanded to permit the trial court to exercise its discretion to strike the firearm enhancements under section 12022.53, subdivision (h), and that trial court erred in imposing and staying four 10-year gang enhancements instead of striking them. Given that the prosecution has already conceded these claims, we will address only Sandoval's first and second claims in detail. Sandoval also joins all issues raised by Ambriz which may accrue to Sandoval's benefit.

DISCUSSION

I. The Sufficiency of the Evidence Claims

A. *Overview*

On appeal Ambriz and Sandoval contend that insufficient evidence supported their murder convictions. Ambriz argues there was insufficient evidence that he knew Sandoval intended to kill Perea or that his actions were a substantial factor in causing Rodriguez's eventual death. Sandoval alleges there was insufficient evidence that he aided and abetted the Rodriguez shooting. We reject these contentions.

B. *Standard of Review*

Challenges to the sufficiency of the evidence in support of a conviction are reviewed under the substantial evidence standard of review. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Therefore, we ask whether, on the entire record, a rational trier of fact could find appellants guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) We must "view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Lewis* (1990) 50 Cal.3d 262, 277.) Reversal based on insufficient evidence is warranted only if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

In short, substantial evidence is evidence that is "reasonable, credible, and of solid value." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Nevertheless, " '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' " (*People v. Lee* (2011) 51 Cal.4th 620, 632.) "When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which

will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion." (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.)

" 'Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, "but our opinion that the circumstances also might reasonably be reconciled with a contrary finding" does not render the evidence insubstantial.' " (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) As a result, we "must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury*, *supra*, 30 Cal.4th at p. 396.) Moreover, inconsistencies in eyewitness testimony do not render evidence of a defendant's guilt insufficient. (See *People v. Champion* (1995) 9 Cal.4th 879, 926-927, overruled on another ground by *People v. Combs* (2004) 34 Cal.4th 821, 860.) Lastly, "unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

C. *Ambriz's Conviction for Perea's Murder*

Ambriz was charged in count 4 with Perea's murder during the barbershop shooting. At trial, the prosecutor argued that Sandoval shot and killed Perea and that Ambriz aided and abetted Sandoval in committing the murder. On appeal, Ambriz contends that there was no substantial evidence that he knew of

Sandoval's intent to kill Perea or that he specifically intended to assist Sandoval in committing premeditated murder.

In order to establish Ambriz's liability as an aider and abettor with respect to Perea's murder, the prosecution had to prove that: (1) Sandoval committed the premeditated murder; (2) Ambriz acted with the intent or purpose of committing, encouraging, or facilitating commission of that crime; and (3) Ambriz, by act or advice, aided, promoted, encouraged or instigated commission of that crime. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1225.) A person aids in the offense if he " ' "in any way, directly or indirectly, aided the actual perpetrator by acts *or* encouraged the perpetrator by words or gestures." ' [Citations.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 411.) To abet a specific intent crime, a person "must share the specific intent of the perpetrator," which means he or she "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

On that night of Perea's murder, Ambriz and Sandoval entered the barbershop in a threatening manner, dressed to both conceal their identities and intimidate the other men in the shop. Ambriz and Sandoval, both established gang members, posed questions to the other men in the shop seemingly designed to determine if the men were also in a gang. Ambriz and Sandoval then followed Perea when he went to the back of the shop and returned when Perea was the only person there. In addition to preparing for the murder by bringing gloves, Ambriz and Sandoval covered up their crime by wiping the door, while Ambriz tried to sell a handgun a few days after Perea's murder.

As explained by the prosecution's expert, gang members earned respect and rose within the gang by going into rival gang territory and shooting rivals. Viewing this evidence in the light most favorable to the prosecution, and presuming in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence (see *People v. Lewis*, *supra*, 50 Cal.3d at p. 277), a rational trier of fact could find beyond a reasonable doubt that Ambriz had aided and abetted Sandoval in committing the offense. (See *People v. Johnson*, supra, 26 Cal.3d at pp. 576-578; *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319.)

On appeal, Ambriz concedes that there is rarely direct evidence of a defendant's mental state and intent must often be inferred from circumstantial evidence. However, Ambriz contends, the circumstantial evidence in this case—or absence thereof—did not support his conviction. For example, Ambriz notes that the prosecution never identified a concrete motive for Perea's murder. Nor could prosecution's gang expert cite a specific motive. We are not persuaded. Although motive is often probative of an intent to kill, "evidence of motive is not required to establish intent to kill, and evidence of motive alone may not always fully explain the shooter's determination to shoot at a fellow human being with lethal force." (*People v. Smith* (2005) 37 Cal.4th 733, 741.) "The point is that where the act of purposefully firing a lethal weapon at another at close range gives rise to an inference of intent to kill, that inference is not dependent on a further showing of any particular *motive* to kill the victim." (*Ibid*.) Moreover, the law does not require that a first degree murderer have a "rational" motive for killing. Anger at the way the victim talked to him (*People v. Jackson* (1981) 121 Cal.App.3d 862, 873, 874) or any motive, "shallow and distorted

but, to the perpetrator, genuine" may be sufficient (*People v. Smith* (1973) 33 Cal.App.3d 51, 66, disapproved on another ground in *People v. Wetmore* (1978) 22 Cal.3d 318, 325, 327, fns. 5, 7; see *People v. Thomas* (1992) 2 Cal.4th 489, 519 [" '[w]e have never required the prosecution to prove a specific motive before affirming a judgment, even one of first degree murder. A senseless, random, but premeditated, killing supports a verdict of first degree murder'"].) Even if a particular motive were in fact required, the apparent personal animus between Perea and Ambriz and Sandoval would certainly suffice as motive here.[13]

Ambriz also argues that knowledge and intent cannot be reasonably inferred from his presence at the scene. " 'Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054; *People v. Lara* (2017) 9 Cal.App.5th 296, 322.) Although mere presence at the scene of a crime is not sufficient in and of itself to

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[13] The jury was instructed with CALCRIM No. 370, which provides that: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty." Thus, even if the jury considered whether the defendants had a motive for killing Perea, the jury either found their personal animus to be sufficient motive or determined that, although there was no clear motive for the crime, substantial evidence supported the determination that Ambriz aided and abetted Perea's murder.

constitute aiding and abetting (*In re White* (2018) 21 Cal.App.5th 18, 26), Ambriz was not merely present at the scene of the killing. Rather, the jury could conclude he helped create the conditions needed for the crime to take place by assisting Sandoval in intimidating the other men in the shop and compelling them to leave. He then returned to the shop with Sandoval, which allowed the two to both outnumber and overpower an already-rattled Perea.[14] Finally, he helped wipe down the crime scene and was tasked with, and thus trusted enough, to dispose of a gun. In short, just as Sandoval would later expressly reveal, Ambriz was his "crimey"—his partner in crime. Even if a reasonable jury could alternatively find that Sandoval acted independently, as Ambriz claims, "the constitutional standard requires us to consider whether the evidence would be sufficient to sustain a conviction, presuming the existence of every fact a jury could reasonably deduce from the evidence and resolving any conflicts in the evidence in favor of upholding the order." (*In re White*, at p. 26.) Under this standard, the evidence was more than sufficient to sustain Ambriz's conviction of the crime.

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[14] Notably, Perea was found with toothpaste and a toothbrush in his left hand. According to Ambriz, this fact shows that Ambriz, like Perea, was surprised by the shooting. However, this fact could also demonstrate that *both* Ambriz and Sandoval waited to strike; that they made a move only when Perea could not easily grab a weapon or fight back in any meaningful way. As the trier of fact, the jury was entitled to accept or, as turned out to be the case here, reject Ambriz's argument and make different findings that, as noted, are supported by sufficient evidence in the record.

Finally, Ambriz's reliance on *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262 (*Juan H.*) is misplaced.[15] In *Juan H.,* the defendant, a juvenile, was at home with his family when someone fired two shots into the trailer where they lived. (*Id.* at p. 1266.) About 90 minutes later, the defendant and his brother confronted two men with whom they had a history of conflict at the trailer park, and who were associated with a rival gang. (*Id.* at pp. 1266–1267.) The defendant's brother asked the two men whether they had fired the shots, and the men replied they knew nothing about the incident. (*Id.* at p. 1267.) The defendant's brother then pulled out a shotgun and fired at both men, killing one of them. (*Ibid.*) The Ninth Circuit granted Juan H.'s federal habeas petition, holding that insufficient evidence supported the conclusion that Juan H. knew his brother planned to commit first degree murder or that Juan H. acted in a way intended to encourage or facilitate the resulting crimes. (*Id.* at p. 1277.) The court further held that, even assuming the element of knowledge, the record contained no evidence that Juan H. did or said anything before, during or after the shooting from which a reasonable fact finder would infer a purpose to aid and abet in the crimes. (*Id.* at pp. 1278–1279.) Specifically, the court held no reasonable fact finder could "conclude that by standing, unarmed, behind his brother, Juan H. provided 'backup,' in the sense of adding deadly force or protecting his brother in a deadly exchange." (*Id.* at p. 1279.)

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[15] We initially note that while we may find lower federal court decisions on points of state law persuasive, they do not control. (*People v. Avena* (1996) 13 Cal.4th 394, 431.)

Juan H. is consistent with the general maxim that a person's mere presence at the scene of a crime is not sufficient to establish aiding and abetting. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1024.) However, as discussed above, Ambriz was not "merely present" and played a far greater role than did the defendant in *Juan H.* Indeed, Ambriz's conduct both before and after the shootings indicated his intent to aid and abet the murder, including assisting Sandoval in intimidating the other men in the shop, thus compelling them to leave, later returning with Sandoval, which allowed the two to outnumber Perea while he was caught off-guard brushing his teeth, helping to wipe down the crime scene, and willingly taking on the task of weapon disposal. We thus reject Ambriz's claim that the evidence was insufficient to establish he aided and abetted Perea's murder.[16]

D. *Ambriz's Conviction for Rodriguez's Murder*

Ambriz contends that his conviction for Rodriguez's murder should be reversed because there was insufficient evidence that his actions were a substantial factor in causing Rodriguez's death.[17] We disagree.

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[16] Moreover, the *Juan H.* court believed the prosecution may have unfairly pursued the defendant because the brother (the actual shooter) "may not have been brought to justice." (*Juan H.*, *supra*, 408 F.3d at p. 1279, fn. 16.) No similar motivation is at issue here.

[17] Sandoval also contends his conviction for Rodriguez's murder should be reversed because there was insufficient evidence that his actions were a substantial factor in causing Rodriguez's death. Given that we reject Ambriz's contention, we reject Sandoval's claim as well.

Ambriz shot Rodriguez on February 9, 2014. Rodriguez sustained multiple gunshot wounds that injured his kidney and spine, rendering him a paraplegic. Rodriguez ultimately died on August 9, 2014, from pneumonia resulting from complications caused by his gunshot wounds. Dr. Gutstadt performed Rodriguez's autopsy on August 13, 2014, but retired before trial. Dr. Paul Gliniecki, a deputy medical examiner, reviewed the autopsy report, as well as Dr. Gutstadt's notes, and testified as to Rodriguez's cause of death. In the six months following his shooting, Rodriguez was hospitalized, sent to rehabilitation centers, and sent back to hospitals for multiple conditions related to his injuries, including sepsis due to pneumonia. Dr. Gliniecki agreed with Dr. Gutstadt's determination that Rodriguez's cause of death was "sequelity of multiple gunshot wounds." According to Dr. Gliniecki, "sequelity" meant "just how the sequence of events that occurred after he received gunshot wounds."[18] Dr. Gliniecki also testified that although he did not review all of Rodriguez's medical records, this did not impact his opinion as to Rodriguez's cause of death.

"The principles of causation apply to crimes as well as torts. [Citation.] 'Just as in tort law, the defendant's act must be the legally responsible cause[, or the proximate cause,] of the injury,

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[18] As noted by the prosecution, "sequelity" does not appear to be a medical term (or an actual word). However, "sequela" means "an abnormal condition resulting from a previous disease." (https://www.dictionary.com/browse/sequela.) In other words, it is "an aftereffect of a disease, condition, or injury" or "a secondary result." (https://www.merriam-webster.com/dictionary/sequela.) It is a "condition which is the consequence of a previous disease or injury." (https://en.oxforddictionaries.com/definition/sequela.)

death or other harm which constitutes the crime.' [Citation.]" (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46-47.) Under California law, an act has caused a death if the death "is the direct, natural, and probable consequence of the act" and the death would not have happened without the act. (CALCRIM No. 240.) "A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (*Ibid.*) If the case involves multiple potential causes, the following instruction should also be given: "There may be more than one cause of [death]. An act . . . causes [death], only if it is a substantial factor in causing the [death]. A substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the [death]."[19] (*Ibid.*)

Indeed, "[a] defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '. . . The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . . The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' [Citation.]" (*People v. Harris* (1975) 52 Cal.App.3d 419, 427.)

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[19] The jury received this instruction pursuant to CALCRIM No. 1402, which uses the same language.

Contrary to Ambriz's claim on appeal, Dr. Gliniecki's testimony sufficiently demonstrated that Ambriz's actions were a substantial factor in causing Rodriguez's death. Any intervening cause was a normal and reasonably foreseeable result of the shooting. Dr. Gliniecki testified that the gunshot wounds led to Rodriguez's poor physical condition, which rendered him unable to manage the pneumonia and other conditions he then contracted. Dr. Gliniecki further testified that Rodriguez's cause of death was "the sequence of events that occurred after he received the gunshot wounds." Although Ambriz claims that Dr. Gliniecki's testimony only established the temporal relationship between the gunshot wounds and death, rather than a causal relationship between the two events, a fairer reading of Dr. Gliniecki's testimony establishes that the proximate cause of Rodriguez's death were the conditions Rodriguez suffered from as a result of those wounds. Ambriz's citation to cases in which medical examiners used clearer language than Dr. Gliniecki when opining as to a victim's cause of death does not mandate that such language be used, and imposing such a requirement would exalt form over substance, especially where, as here, the doctor's opinion was clear when taken in the context of his entire testimony.

E. *Sandoval's Conviction for Rodriguez's Murder*

Sandoval alleges there was insufficient evidence that he aided and abetted Rodriguez's shooting. According to Sandoval, while the witnesses established his presence in a vehicle during the shooting, he never exited the car or wielded a weapon. Furthermore, Sandoval argues, although Rodas testified that Sandoval shouted encouragement at Ambriz during the shooting,

his testimony changed suddenly after direct examination had ended and was contradicted by other portions of his testimony. We reject Sandoval's sufficiency of the evidence claim.

As discussed above, on February 9, 2014, at around 3:00 p.m., Rodriguez, Rodas, Garcia, and Tlaseca, among others, were gathered in an alley. Ambriz arrived, parked his car, and exited from the driver's seat. Ambriz approached the men and said, "The terrain is hot." Ambriz returned to his car and drove away with Sandoval in the front passenger seat. Ambriz returned at around 5:00 p.m., parked in the same spot as before, and got out from the driver's side of the car. Sandoval was in the front passenger seat. Ambriz approached the group and fired several shots at the men. Rodas heard someone from inside the car yell something like, "You're not going to hit anybody from there," and "get closer." Ambriz then moved closer to the men and continued to fire.

During his subsequent jail cell conversation with the informant, Sandoval confirmed he was at the alley shooting. Sandoval described the shooting and how his accomplice shot two victims with a .45-caliber gun. At the preliminary hearing, Garcia identified Ambriz and Sandoval as the two men who had participated in the shooting. At trial, Garcia again identified Ambriz and Sandoval as the two men at the alley that day, and identified Ambriz as the shooter. Tlaseca also identified Ambriz as the shooter at trial. Rodas also identified Ambriz as the shooter and identified Sandoval as the man in Ambriz's car.

On appeal, Sandoval argues that Rodas, Garcia and Tlaseca provided conflicting testimony that at best established Sandoval was present at the shooting. Furthermore, Sandoval contends, Rodas testified that there were three people in the

car—Ambriz, Sandoval, and one other—not two.[20] Sandoval also points to testimony from Rodas describing Sandoval's words of encouragement. When Ambriz first fired, Rodas heard Sandoval yell from inside the car something like, "You're not gonna hit anybody" from that location and to "get closer" or "give it to them." Ambriz then moved closer to the other men and continued to shoot at them. According to Rodas, after Sandoval shouted those words from inside the car, Ambriz became "more daring" in approaching the other men. However, when Rodas was asked if Sandoval had said, "You're not going to hit them from there," Rodas answered, "I don't know if that was said." With respect to Sandoval's exhortation to "get closer" or "give it to them," Rodas testified that Sandoval said something like that but that "it could have been a bunch of different things."[21]

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[20] Rodas did at one point testify that there were more than two people in the car. Rodas was then asked: "Is that counting [Ambriz] and one more?" and answered: "Yes." Rodas was then allowed to refresh his recollection with a police report and confirmed that Sandoval was in Ambriz's car when it arrived the second time. Later, Rodas unambiguously testified that Sandoval was the only other person in Ambriz's car. Although Sandoval contends that Tlaseca testified that there were more than two people in the car, Tlaseca actually testified that he did not know how many people were in the car. We also note that Tlaseca, like Rodas, used an interpreter at trial. Garcia clearly testified that, at the time of the shooting, there was "one person in the car and one person standing to the side of the car." When asked if he was sure there was not at least one other person in the back seat, Garcia said he did not see that.

[21] Whatever the precise language, Sandoval's words effectively encouraged Ambriz to move closer to the other men during the shooting.

Sandoval also notes that Rodas did not reveal Sandoval's statements until after his direct examination at trial. Indeed, at the preliminary hearing, Rodas denied that either Ambriz or Sandoval had said a word during the shooting. When later addressing the discrepancy, the prosecutor noted that Rodas was an "incredibly reluctant and scared" witness who had already been threatened by Ambriz during trial. When Sandoval's attorney asked Rodas why he had failed to reveal Sandoval's statements before this point, Rodas said he did not recall detectives ever asking him if he had heard anyone inside the car encouraging Ambriz during the shooting.[22]

Although the testimony provided by Rodas was arguably inconsistent, as with any trial witness, the jury remained free to choose the witness or witnesses it believed and what part of a witness's testimony it found believable. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 940.) Here, the jury believed that Sandoval aided and abetted Ambriz during the alley shooting. That finding is supported by substantial evidence. Ambriz and Sandoval arrived at the alley together, and Ambriz, either with Sandoval beside him or with Sandoval in the front passenger seat, threatened the men playing cards. Ambriz and Sandoval

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[22] Rodas actually told the prosecution about Sandoval's statements two days before he testified at trial but the prosecutor did not turn over this information until Rodas completed his direct examination. (The prosecutor said she forgot to turn over the information to defense counsel. Indeed, she also forgot to ask Rodas about Sandoval's statements during her own direct examination of Rodas. The statements were revealed when the prosecutor told the court she wanted to elicit Sandoval's statements during her redirect of Rodas.) As a result, the trial court gave the jury a late discovery instruction.

returned about two hours later. While Ambriz exited the driver's seat and shot at the men, Sandoval remained in the car's front passenger seat. When someone in the car yelled at Ambriz to move closer so that he could hit the men, Ambriz complied and fired even more shots. Garcia and Rodas identified Sandoval as the other man in the car and there was no substantial evidence that anyone other than Sandoval was in the car. Thus, sufficient evidence supported the jury's determination that it was Sandoval who encouraged Ambriz to move closer to the victims so that he would be more likely to hit them.

Sandoval's reliance on *People v. Leon* (2008) 161 Cal.App.4th 149 is misplaced. In that case, Leon, and his codefendant Rodriguez, were breaking into vehicles when a witness spotted the two and said he was going to call the police. Rodriguez looked at the witness and fired a gun in the air. (*Id.* at pp. 153-154.) Leon was convicted of burglary, possession of a concealed weapon and, on an aiding and abetting theory, witness intimidation. (*Id.* at pp. 155-156.) On appeal, Leon argued that there was insufficient evidence to support his conviction for witness intimidation. (*Id.* at pp. 159-160.) The prosecution noted that both defendants were members of the same gang and were burglarizing cars in a rival gang's territory. In addition, Leon was found with ammunition and a firearm in his possession after he and Rodriguez fled the scene of the burglary. The prosecution argued that this evidence, in combination with Leon's action in " '*staring* at the person who said he was going to call the police and walking with Rodriguez while Rodriguez shot a gun in the air, encouraged and/or facilitated Rodriguez in his commission of this offense.' " (*Id.* at p. 159.) The Court of Appeal disagreed. "Assuming, without deciding, that a defendant's act of 'staring' at

a witness who has told the defendant that he is going to call the police could constitute an act sufficient to support a finding of aider and abetter liability, there was no such evidence in this case." No witness testified that Leon stared at them. Although the witnesses said "they were able to 'make eye contact' with Rodriguez and Leon," this happened before they said they were going to call the police. The court concluded that this evidence was "not sufficient to support a finding that Leon, 'by act or advice, aide[d], promote[d], encourage[d] or instigate[d]' " the witness intimidation. (*Ibid*.) Unlike *Leon*, the evidence in this case showed more than simple presence at the scene of the crime or the mere failure to prevent the crime. Ambriz and Sandoval returned to the alley shortly after Ambriz explicitly threatened the men assembled here. While Ambriz later shot at the men, Sandoval shouted encouragement from the car, goading Ambriz to get closer so that he could actually hit the victims. The quantum of evidence here plainly exceeds that at issue in *Leon*.

II. The Exclusion of Sandoval's Jail Phone Conversation

Prior to trial, the prosecution sought to introduce recorded phone calls made by Ambriz and Sandoval from jail to family members, pursuant to Evidence Code section 1220.[23] One of the calls was between Sandoval and his mother and other family members. During this particular call, Sandoval agreed with family members who maintained he was innocent.[24] Sandoval

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[23] Under section 1220, "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ."

also complained during this call that he was being charged with a gang enhancement when he was "non-active."

The prosecution subsequently withdrew its request to introduce this particular phone conversation between Sandoval and his mother. Sandoval's attorney then moved to introduce the phone call because Sandoval "maintains his innocence" and "states he's not active" in the call. Sandoval's attorney argued that the call was relevant and gave context to the other calls made from jail. The prosecutor objected, arguing that the call was a separate conversation and was not admissible under Evidence Code section 1220 when offered by the defense. The trial court agreed with the prosecution, noting that this call involved different people and occurred at a different time. As there was no applicable hearsay exception, and the evidence was not offered by the prosecution, the trial court excluded the call.

On appeal, Sandoval does not argue that the jail call was admissible under Evidence Code section 1220. Rather, Sandoval claims that the trial court and prosecutor erred by concentrating the analysis under Evidence Code section 1220 instead of Evidence Code section 1202.[25] At no time during trial, however,

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[24] During this call, one family member named Daisy said, "Don't let them blame you for something you didn't do, okay?" while another family member then said, "Exactly." Sandoval simply answered, "Yeah." Daisy later told Sandoval, "You are innocent and that's all you have to know, okay?" Sandoval only replied, "All right. I love you."

[25] Under section 1202, "[e]vidence of a statement . . . by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though

did Sandoval's attorney seek to admit this particular call under Evidence Code section 1202. Therefore, Sandoval's claim, to the extent it is based on Evidence Code section 1202, was not preserved for appellate review. (See, e.g., *People v. Mills* (2010) 48 Cal.4th 158, 170.)

In his reply brief, Sandoval contends the claim was preserved because it was "argued at length" below and "the parties were aware of the gravamen of the issue." After reviewing the hearing transcript, however, we disagree. Although the parties did discuss in detail the admission of a series of phone calls with the court, the argument over this *particular* call was in fact quite brief. Furthermore, as noted above, defense counsel did not argue that the call was admissible pursuant to Evidence Code section 1202. Instead, as Sandoval admits on appeal, counsel only argued that this particular call was admissible because Sandoval "maintains his innocence" and "states he's not active." When the prosecution countered that the call was inadmissible under Evidence Code section 1220 when offered by the defense, counsel did not cite an alternative basis for admissibility

Sandoval contends that this brief argument also raised a constitutional due process claim. We do not agree that counsel's argument fairly advised the trial court of the substance of the objection. (See *People v. Scott* (1978) 21 Cal.3d 284, 290.) In a criminal case, an objection will be deemed preserved if, despite inadequate phrasing, the record shows that the trial court understood the issue presented. (*People v. Bolinski* (1968) 260

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he is not given and has not had an opportunity to explain or to deny such inconsistent statement . . . ."

Cal.App.2d 705, 722-723.) In this case, however, the hearing transcript does not demonstrate that the trial court fully understood and considered the nature of the constitutional challenge which Sandoval now raises. As a result, we hold that Sandoval's objection, whether on statutory or constitutional grounds, was waived by this lack of specificity.[26] (Cf. *Scott*, *supra*, at p. 290.)

III. The Remaining Claims

As noted above, the prosecution has conceded the remaining claims, namely that: the true finding that Ambriz personally discharged a firearm in connection with Perea's murder should be reversed; the four 10-year gang enhancement sentences should be stricken; the case should be remanded to permit the trial court to exercise its discretion to strike the firearm enhancements under section 12022.53, subdivision (h); and that the abstracts of judgment should be amended to reflect the trial court's oral order that Ambriz's liability for victim restitution is joint and several with Sandoval. We address each claim briefly in order to assist the trial court on remand.

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[26] Sandoval also argues that an unpreserved claim may be addressed where trial counsel was ineffective in failing to properly preserve the issue and had no tactical reason in doing so. But where, as here, the record contains no explanation for trial counsel's allegedly ineffective assistance, the issue is more appropriately litigated in a habeas corpus proceeding. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

A. *The Personal Discharge of a Firearm*

Count 1 of the charging document addressed the murder of Rodriguez. As to count 1, the district attorney alleged that Ambriz personally used and discharged a firearm (§ 12022.53, subds. (b), (c), (d).) Counts 2 and 3 addressed the attempted murders of Rodas and Garcia. As to counts 2 and 3, the district attorney alleged that a principal personally used and discharged a firearm (§ 12022.53, subds. (b), (c), (e)(1).) Count 4 addressed the murder of Perea. As to count 4, the district attorney alleged that a principal personally used and discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1).)

The jury verdict forms used for Ambriz confused matters. With respect to count 1, Ambriz's verdict form asked the jury to determine if Ambriz personally discharged a firearm, causing great bodily injury or death, within the meaning of section 12022.53, subdivision (d), and if a principal personally discharged a firearm, causing great bodily injury or death, within the meaning of section 12022.53, subdivisions (d) and (e)(1). As to counts 2 and 3, the verdict forms for each count asked the jury to determine if Ambriz personally used a firearm within the meaning of section 12022.53, subdivision (b), if Ambriz personally discharged a firearm within the meaning of section 12022.53, subdivision (c), if a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), and if a principal personally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

Given the eyewitness testimony presented at trial, the verdict forms for counts 1, 2 and 3 were correctly drafted. However, with respect to count 4, Ambriz's verdict form asked the jury to determine if a principal personally discharged a

firearm, causing great bodily injury and death, within the meaning of section 12022.53, subdivisions (d) and (e)(1), *and* if Ambriz personally discharged a firearm, causing great bodily injury or death, within the meaning of section 12022.53, subdivision (d). As discussed below, given the evidence presented at trial, the verdict form for count 4 was incorrectly drafted.

The jury found all the firearm allegations to be true. On appeal, Ambriz argues that, as to count 4, the true finding that he personally discharged a firearm should be reversed because it was not supported by substantial evidence. The prosecution agrees. So do we. With respect to count 4, the prosecution pleaded and proved that Sandoval personally discharged a firearm pursuant to section 12022.53, subdivision (d). Thus, the jury properly found that Sandoval personally discharged a firearm. As for Ambriz, the jury properly found that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (d) and (e)(1). But there was no evidence that Ambriz had personally discharged a firearm. Accordingly, as to count 4, the separate finding that Ambriz personally discharged a firearm, causing great bodily injury or death, within the meaning of section 12022.53, subdivision (d), must be reversed. We remand so the trial court can strike this particular enhancement and correct the abstract of judgment.[27]

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[27] In box 2, the abstract of judgment states that, as to count 4, the jury found the section 12022.53, subdivision (d), enhancement to be true. However, given our holding here, box 2 must be corrected. Box 12, which states that: "The 25 years to life sentences on counts 1 & 4 are pursuant to PC 12022.53(D) and PC 12022.53(E)(1)" is also now incorrect.

B. *The 10-year Gang Enhancements*

The trial court sentenced Ambriz and Sandoval to two consecutive LWOP terms, plus 64 years to life, plus 40 years in state prison. The court imposed and stayed a 10-year term for the gang enhancement (§ 186.22, subd. (b)(1)(C)) on each of the four counts. On appeal, Ambriz and Sandoval contend that the trial court erred by imposing four 10-year gang enhancements pursuant to section 186.22, subdivision (b)(1)(C). The prosecution agrees. So do we. Section 186.22, subdivision (b), provides alternative methods for punishing a felon whose crime was committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C), imposes a 10-year enhancement on a defendant who commits a violent felony. But that provision does *not* apply where the violent felony is "punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) In that situation, section 186.22, subdivision (b)(5), "applies and [instead] imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

Furthermore, section 12022.53, subdivision (e)(2), provides that an enhancement for participation in a criminal street gang "shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." Here, the jury found that Ambriz, not Sandoval, personally used a firearm in the commission of the murder in count 1, as well as the attempted murders in counts 2 and 3. Consequently, as to counts 1 through 3, Sandoval is not subject to the enhancement for participation in a criminal street gang in addition to the enhancement imposed under section

12022.53, subdivision (d). (See *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238.) Moreover, as discussed above, the jury erroneously found that Ambriz personally used a firearm in the commission of the murder in count 4, and the trial court therefore must strike the enhancement. Thus, as to count 4, Ambriz is no longer subject to the enhancement for participation in a criminal street gang, in addition to the enhancement imposed under section 12022.53, subdivision (d). (See *ibid*.)

Accordingly, we remand so the trial court can strike the 10-year gang enhancements and impose 15-year minimum parole eligibility terms instead. (See *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404-1405 [modifying judgment to strike 10-year gang enhancements and impose 15-year minimum parole eligibility terms instead].) With respect to Ambriz, the 15-year minimum parole eligibility term can be imposed on counts 1 through 3. With respect to Sandoval, the 15-year minimum parole eligibility term can be imposed only on count 4.

C. *Newly Amended Section 12022.53*

Ambriz and Sandoval contend that, in light of newly amended section 12022.53, their cases should be remanded so that the trial court can exercise its discretion to strike the firearm enhancements imposed on each count. The prosecution agrees. We agree. Ambriz's sentence included a consecutive 25-year-to-life enhancement under section 12022.53, subdivision (d), on count 1, and consecutive 20-year enhancements under section 12022.53, subdivision (c), on counts 2 and 3, for personally using a firearm, as well as a consecutive 25-year-to-life enhancement under section 12022.53, subdivisions (d) and (e)(1), on count 4 for

a principal using a firearm.[28] Sandoval's sentence included consecutive 25-year-to-life enhancements under section 12022.53, subdivisions (d) and (e)(1), on counts 1 and 4, and consecutive 20-year enhancements under section 12022.53, subdivision (c), on counts 2 and 3, for a principal personally using a firearm.

At the time of sentencing in this case, trial courts had no authority to strike firearm enhancements proven under sections 12022.5 and 12022.53. (See §§ 12022.5, subd. (c), 12022.53, subd. (h).) But Senate Bill No. 620, which became effective January 1, 2018, removed the prohibition on striking the enhancements. Now, in the interest of justice pursuant to section 1385, a trial court may strike or dismiss an enhancement otherwise imposed by this section. (*Ibid*.) This new statutory amendment applies retroactively. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507.) Consequently, Ambriz and Sandoval must receive a new sentencing hearing at which the trial court can consider whether to strike the firearm enhancements (§ 12022.53, subds. (c), (d), (e)(1)) in counts 1 through 4 pursuant to the discretion conferred by Senate Bill No. 620.

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[28] As discussed above, with respect to count 4, Ambriz's verdict form erroneously asked the jury to determine if a principal personally discharged a firearm, within the meaning of section 12022.53, subdivisions (d) and (e)(1), *and* if Ambriz personally discharged a firearm, within the meaning of section 12022.53, subdivision (d). Despite this error, which now requires that the section 12022.53, subdivision (d), enhancement be stricken, the trial court did not actually impose sentence on Ambriz for this particular enhancement.

D. *Restitution*

Lastly, Ambriz states that the abstracts of judgment should be amended to reflect the trial court's oral order that Ambriz's liability for victim restitution is joint and several with Sandoval. The prosecution agrees. We concur. The trial court ordered victim restitution in the amount of $5,567, for which Ambriz and Sandoval were jointly and severally liable. Ambriz's order for victim restitution accurately states that Ambriz and Sandoval are jointly and severally liable. Sandoval's abstract of judgment also correctly states that liability is joint and several. However, Ambriz's abstract of judgment for restitution and abstract of judgment do not specify that liability is joint and several. Accordingly, we remand so that the trial court can correct Ambriz's abstract of judgment to reflect joint and several liability for the restitution order. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [where there is a discrepancy between oral pronouncement of judgment and abstract of judgment, oral pronouncement controls].)

DISPOSITION

The judgment is affirmed in part and reversed in part. We remand so that the trial court can: (1) strike the section 12022.53, subdivision (d), enhancement imposed on Ambriz in count 4; (2) strike the 10-year gang enhancements imposed on Ambriz and instead impose 15-year minimum parole eligibility terms on counts 1 through 3; (3) strike the 10-year gang enhancements imposed on Sandoval and instead impose 15-year minimum parole eligibility term on count 4 only; (4) hold a new sentencing hearing for Ambriz and Sandoval to consider whether

to strike the firearm enhancements in counts 1 through 4 pursuant to the discretion conferred by Senate Bill No. 620; and (5) correct Ambriz's abstract of judgment to reflect joint and several liability for the restitution order.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.